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CONSTITUTIONAL LIMITATION OF MUNICIPAL DEBTS.

[Third and last part]

MONEYS IN THE TREASURY.

We have seen that authority to create a debt which, alone, or added to existing debts, is more than 2 per cent of the valuation of property, must be obtained from the people by a vote. The first step is the decision by the authorities of the city, borough, county, school district, etc., that an increase of debt is desired. The election is not to be had until after the corporate authorities, "by their ordinance or vote, shall have signified a desire to make such increase of indebtedness."[1] The desire may be expressed by "ordinance or vote." If the expression takes the form of an ordinance, it will not be necessary that it should be valid as an ordinance. It is enough if it expresses the desire by the vote which adopted it.[2]

NOTICE.

When the corporate authorities have signified the desire to increase the debt, they are to "give notice during at least 30 days, by weekly avertisments in the newspapers, not exceeding 3 in each district; and, if no newspapers be published therein, by at least 20 printed handbills posted in the most public parts thereof, of an election"[3] to be held on a day by them to be fixed, for the purpose of obtaining the assent of the electors to the proposed

[1]Act June 9, 1891; 3 Stewart, Purd. 2723; Act May 1, 1909, P. L. 317.
[2]Jacobs v. East Bangor Borough, 8 North. 19.
[3]Act May 1, 1909; P. L. 317.

increase of indebtedness. Henderson P.J. is of the opinion that the advertisement must appear in 3 newspapers if there are so many published in the city, borough, county, etc.[4] Kunkle, J., thinks otherwise. "One newspaper, published in the English language, may perhaps be sufficient." One newspaper in the German language is not enough. If a regular advertisement occurs in a German paper, and an advertisement for a part of the 30 days occurs in an English paper, (The Harrisburg Telegraph) and for another part in another English paper, (The Star Independent) the two last may be regarded as an advertisement in one paper, and this together with the advertisement in the German paper, is enough.[5] The notice in Witherop v. Titusville School Board[6] was published in the Morning Herald on June 6, 27, 28, 29 and 30, and on July 1. The election was to be held on July 12. The notice was printed in the Sunday World on June, 5, 12, 19, 26, and on July 3, and in the American Citizen on June 10, 17, 24, and on July 1. There was an interval of 3 weeks between the first and second appearance of the notice in the Morning Herald. The last notice in the Sunday World was 9 days, and that in the American Citizen 11 days before the election. It is doubtful, therefore, thought Henderson, P. J., whether the publication in the two last named papers was sufficient. Compliance with the statutory requirement of notice is a condition precedent to the right or power to issue bonds, or increase the debt. Hence, in the case last cited, the court restrained the carrying out of the contract for the erection of a school building.[7]

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[4]Witherop v. Titusville School Dist. 7 C. C. 451.

[5]Harrisburg City v. Dauphin Deposit Bank, 27 C.C. 401; 12 Dist. 207. The election was to be held Feb. 18, 1902. The Star Independent published it Jan. 18, and weekly thereafter, until, and including Feb. 8. It omitted the notice on Feb. 15. The Telegraph first published the notice Jan. 20; it published it again Jan. 25, Feb. 1, Feb. 8, Feb. 15.

[6]7 C. C. 451.

[7]Reference is made to the possibility that the "light vote" cast at the election was not due to the want of notice and that abundant actual notice had been given. In Harrisburg City v. Dauphin Deposit Bank, 27 C. C. 401, the court on case stated held the election sufficient to make the bonds valid, remarking that the measure was advocated on the hustings, in the daily papers, and discussed in the community; the vote cast indicates a general diffusion of knowledge of the impending election, among the electors.

CONTENTS OF THE NOTICE.

The notice to be given by newspaper or handbill, must "contain a statement of the amount of the existing debt, of the amount and percentage of the proposed increase, and of the purposes for which the indebtedness is to be increased. In Bloomsburg Town Election Case,[8] Ikeler, P. J., enjoined the holding of an election, because, *inter alia*, there were stated several purposes for which the debt was to be increased; viz, to fund an existing floating debt of $12,500; to pay an existing judgment for tort against the town, to establish an electric light plant, to pay damages and expenses of opening two streets. "An ordinance" he remarks, "which lets loose upon the voters of the town of Bloomsburg the excitement and expense of an election upon these several independent questions of town policy and administration, with no power or privilege to discriminate between them, but compels them to vote for the whole or none, is not warranted by the constitution, or by statute law, but is opposed by both." Other courts have not had similar scruples. Thus, no animadversion was made on a vote to increase debt for the public improvement of streets of a borough, for the erection or purchase of water works, and electric lighting plants[9] or on a vote to telford four district roads; to drain and grade five other streets[10] or on a proposal to borrow $12,200,000, for 18 different purposes.[11] If the notice states the objects of the increase of debt of a school district differently from the vote of the school board expressive of the desire of the authorities to increase the debt, the election will be declared illegal and set aside by the court of quarter sessions[12] unless the discrepancy is the result of a clerical error; is unintentional, and is not serious. It was not found serious when the ordinance correctly stated the valuation at $358,735, and the percentage of increase 5.296, and the advertisement stated the valuation as $538,735, and the percentage as 3.545. An injunction against using the bonds was dissolved.[13]

[8]18 C. C. 449. cf. Barr v. Phila.; 191 Pa. 438.

[9]Howard's Appeal, 162 Pa. 374. Pennypacker. J., thinks he avoids difficulty by saying that the voter does not vote for the objects for which the increase of debt is to be made, but for the increase; upon one subject therefore; Barr v. Philadelphia, 191 Pa. 438.

[10]Major v. Aldan, 209 Pa. 247.

[11]Barr v. Phila., 191 Pa. 438.

[12] *In re* Red Lyon School District; 14 Dist. 858.

[13]Jacob v. East Bangor Borough, 8 North. 19.

EFFECT OF DESIGNATION OF PURPOSE OF INCREASE OF DEBT.

It would be more than idle to require the object or purpose of an increase of debt to be stated to the voter, as well as the proposed amount of increase of debt, if having been by the proposed object persuaded to vote the loan, it could lawfully be used for some other purpose. The purpose is stated in the notice. It is in a brief form, repeated in the ballot. Not of much significance then, is the statement of Pennypacker, J. that "nowhere is it indicated that they [the electors] are to assent to or dissent from the purpose or purposes for which the moneys are to be utilized." The voters, he says, are aided to vote "intelligently" upon the question of increase of debt.[14] They vote intelligently only when they know for what proposed object this proposed debt is sought to be made and they as much approve the object as the debt. The two are inseparable: to approve the debt without approving the object, would be stupid, and to approve the object without approving the debt, equally so. A similar statement is made by Brown, J.[15] "Neither" he remarks, "in the constitution nor in the act of assembly regulating the election is there any provision that the electors shall pass upon the purpose of the loan," but he virtually retracts the observation when he afterwards adds, "In voting for the increase the electors have the right to assume, *and vote accordingly*, that their representatives will expend the money for the purpose for which they asked it. To permit them to do otherwise would be to permit them to practice fraud and deception upon their trusting constituents, and when an attempt is made by those in authority to so violate faith with the people, *they will be halted by a chancellor.*"[16] In short, the bonds issued without the approval of the people, will be void; the attempted use of the moneys procured by their sale, for uses different from those approved by the people, in voting for the increased debt, will be pervented at their instance by the chancellor. There can be no increase of the debt beyond the amount of increase designated in the notice.[17]

[14]Barr v. Phila., 191 Pa. 438.

[15]Major v. Aldan Borough, 209 Pa. 247.

[16]Major v. Aldan Borough, 209 Pa. 247.

[17]Witherop v. Titusville Dist. 7 C. C. 451.

UNIMPORTANT DEVIATIONS FROM THE ANNOUNCED OBJECT OF THE INCREASE

The city, borough, county authorities may make immaterial and unavoidable departures from the published object of the increase of debt, without incurring an injunction at the suit of a tax-payer. An increase of the borough debt by $17,500 was proposed by the council for the making of improvements thus described; Grading and telfording Providence road $8,000;grading telfording and resurfacing Oak Lane, $700; grading, telfording, and resurfacing Springfield road, $5,000; grading, telfording and resurfacing Clifton Avenue, 2,000." The increase of debt being approved by the voters, the council advertised for bids. The specifications provided that, on the sub-grade as prepared a telford pavement is to be laid. The foundation course is to consist of irregular shaped, hard, tough and durable stone, laid by hand so as to break joints as far as possible. They must be six inches deep, 6 to 10 inches long, 4 to 6 inches wide, and must be placed on their broadest edges and lengthwise across the roadway. All the irregularities of the upper part of the foundation must be broken off with rapping hammers, and the interstices filled up with stone chips, making this layer when complete, a firm substantial and even pavement 6 inches deep. The authorities with the money voted were unable to make a contract in strict conformity with these specifications. They therefore made a contract, providing that upon the subgrade a pavement is to be laid. "The foundation course is to consist of irregular shaped, hard, tough and durable slag of size and quality to be approved by the highway committee, 8 inches deep, and repeatedly rolled with a roller weighing not less than 15 tons, until it forms a foundation at least 6 inches deep." The original specification remained unaltered as to what was to be put upon this foundation. Brown, J., on a bill to restrain the borough from carrying out the new contract, observed that the only difference between it and the original, was in respect to the bottom construction, and that the court below had found that a telford construction of slag of the size, shape and laid in the same manner as natural stone would constitute a telford pavement. "As far as the end to be reached is concerned, I am of the opinion that if a solid foundation is procured under the same circumstances the one is as good as the other." That is, if the court thinks the pavement to be furnished is as good as that contemplated by the voters, and of the same

species[eg. a telford pavement.] the voters must submit to the use of their money upon the pavement not approved by them, but approved by the chancellor.[18]

THE ELECTION HELD.

The election is to be held at the place, time, and under the same regulations as provided by law for the holding of municipal elections. The act of April 20, 1874, and the act of June 9, 1891, required that the tickets to be used by the elector, should be either written or printed, that they should be labeled on the outside "Increase the debt' ; and should contain on the inside the words "No increase of debt", or "Debt may be increased" and also a brief statement of the purpose and amount of increase. The act of June 10, 1893 P. L. 419, which *inter alia*, requires the voter to signify his will concerning questions submitted to him, on the same ballot as that which names candidates for office, is unconstitutional, in so far as it applies to votes upon increase of debt, because its title gives no notice, that such subject will be dealt with in it.[19] The act of April 29, 1903 P. L. 338, which is constitutional[20] requires the question [of increase of debt or other] to be printed on the ballot in brief form and followed by the words "yes" and "no". If candidates for office are being voted for also, the question must be printed after the list of candidates. An election in 1906, in which the electors used ballots of the form prescribed by the act of 1891, was void, and the issue of bonds in pursuance of it was enjoined.[21] The act of May 1, 1909[22]

[18]Major v. Aldan Borough 209 Pa. 247. The voters, however, simply approved of the debt, for grading, telfording and surfacing. Further specification was not found in the notice of the election, or in the ballots. The first specifications were made after the election. The real question then was not that which the court spent much time upon; viz whether the expressed will of the people could be departed from, but whether having made an unsuccessful effort to secure a contract with one set of specifications, the council could enter into a contract the specifications of which were somewhat different.

[19]Evans v. Willistown Township, 168 Pa. 578 Hence an election held in 1894 to increase the debt in which the voters used separate ballots, as the act of 1891 required, was not for that reason invalid.

[20]McLaughlin v. Summit Hill Borough, 224 Pa. 425; Oughton v. Black, 212 Pa.1; Holtzman v. Braddock, 14 Dist. 547; Conshohocken Borough v. County Commissioners, 14 Dist. 141.

[21]McLaughlin v. Summit Hill Borough, 224 Pa. 425; Holzman v. Braddock, 14 Dist. 547. Ballots must be furnished by the county commissioners; not by the borough authorities, 224 Pa. 425. The commissioners will be compelled by mandamus to print the ballots to be used in a borough where a vote on increase of debt is to be taken, in the form prescribed by the act of April 29 1903, P. L. 338; Conshohocken Borough v. County Commissioners; 14 Dist. 141.

[22]P. L. 317.

concerning increase of indebtedness seems to change once more the law concerning ballots. It says that it shall be the duty of the inspectors "to receive tickets, and to deposit said tickets in a box provided for that purpose, as is provided by law in regard to *other* tickets received at said election and tickets so received shall be counted." No provision is made for the form of the tickets. May they be written or printed? Must they state the object of the increase of the debt? Must they state the amount of increase? How is the assent or dissent of the voter to be manifested?[23]

RETURN OF ELECTION.

The tickets received by the inspectors, are to be counted, and a return thereof made to the clerk of the Court of Quarter Sessions of the proper county, duly certified as is required by law together with a certified copy of the ordinance and the advertisement.[24] In receiving and counting, and in making returns of the votes cast, the inspectors, judges and clerks of the election shall be governed by the laws of the state regulating municipal elections; and the vote shall be counted by the court as is now provided by general laws governing municipal elections. So says the act of May 1, 1909: as said the act of June 9, 1901. But, it has been decided that this language does not require that the vote of a borough or township should be counted by court of quarter sessions, or any other. The requirement that the vote shall be computed by the court can refer only to elections in cities. In township and borough elections, the returns are simply directed to the clerk of quarter sessions, delivered into his office and filed there.[25] The language of the act of 1891, re-

[23]In *In re* Red Lyon School District, 14 Dist., 858, it seems to have been assumed that the act of 1891 still regulated in 1905, the form of ballot, in votes on increase of debt. The election was set aside by the Quarter Sessions, because the ballot did not contain a statement of the purpose and amount of the increase of debt; no tally of the votes polled was kept and attached to the returns, and the purpose of the increase set forth in the resolution of the school board was different from that set forth in the public notice. But in Fowler v. Gable, 3 Dist. 23, the jurisdiction of the court to entertain a petition to contest an election on increase of indebtedness was denied.

[24]Act May 1, 1909; P. L. 317. "Ordinance" here includes the vote of such authorities, e.g. supervisors, county commissioners, school directors, as do not act by ordinance; and the votes of council not in the form of ordinance. Jacobs v. East Bangor Borough, 8 North. 19.

peated in the act of 1909, Weiss, J., remarks, "whatever changes the amendment [of the act of 1874] may have intended to effect, its phraseology renders it inoperative, and defeats its intent." Hence he declined, as judge of the Quarter Sessions, to compute the vote cast in the Borough of Steelton, upon the increase of its indebtedness.[26]

NUMBERING BALLOTS.

The 4th section of Article VIII of the constitution [since changed by the Amendment of November 5, 1901] requiring that the ballots be numbered, was held inapplicable to a vote upon the increase of indebtedness. But, even if the constitution applied, an election would not be declared illegal and invalid, because the ballots had not been numbered, everything else being regular, honest and fair.[27] In Clark v. Luzerne Borough[28] a preliminary injunction against incurring debt after a vote of the electors was issued, and the Supreme Court refused to interfere with it, where the bill and injunction affidavits averred that legal notice of the election had not been given, that the tickets used did not state the purpose and amount of the debt, that they were not numbered, nor deposited in the proper box, that no voting list of electors had been kept, and that the ordinance authorizing the election had not been passed at a legal meeting of council; that its title was misleading, and that it had not been duly published.

ACTING UPON THE ELECTION

The corporate authorities, signifying "a desire to make[29] the increase of indebtedness, are to appoint an election, give notice for 30 days of it, etc. and, if the vote is favorable to the increase they may then resolve upon the increase or not, as they deem best. From the use of the word "desire" it cannot be legitimately inferred that only the same councils, school boards, board of county commissioners, etc. as expressed the desire for the vote,

[25]Clough v. Shreve, 10 C. C. 398. An injunction against increasing the debt of the borough of Union City was refused notwithstanding that the returns of election had not been computed by the quarter sessions.

[26]Steelton Borough Election, 22 C. C. 593; 8 Dist. 545. The act of April 29, 1903 required the vote to be on the same ballot as that for officers.

[27]Rebman v. School District of Crafton, 201 Pa. 437.

[28]196 Pa. 210.

[29]Act May 1, 1909, P. L. 317,

and appointed the election, can resolve, after the election to make increase of indebtedness. Were that so, the death of a single member would render the whole proceeding abortive. It is intimated by Pennypacker, P. J., that the final step to increase the debt ought to be taken within a year from the date of the election.[30]

REPEATING ELECTION.

If the decision of the electors is against the increase of debt, "no other election on the 'same subject' shall be held in that municipality for one year from the date of such preceding election.[31]" The "same subject" is, the increase of debt; any increase of debt. A second election to increase debt, within the year, is forbidden, although the amount of proposed increase, and the objects of the increase, are different. The first election having been held on Feb. 17, 1903, a second held Feb. 16, 1904, is void although both elections were held concurrently with the regular spring elections of the year. Hence, the second election having approved of the increase, the court will at the suit of a taxpayer enjoin against making the increase.[32]

PROVISION FOR TAX.

The 1st, section of the act of 1897; P. L. 18, repeating the language of the 2d, section of the act of April 20, 1874, provides that when the debt to be increased is less than 2 percentum, and no election is therefore necessary, coupon bonds or other securities may be issued, the principal of which shall be reimbursable at period not exceeding 30 years from the date at which the issue is authorized, "and an annual tax commencing the first year after such debt shall be increased or incurred, sufficient for the payment of the interest thereon, and the principal of such debt within a period not exceeding 30 years from the date of such increase, shall be forthwith assessed." This tax must be assessed before the issue of the bonds and the issue of them before the assessment of the tax, will be enjoined by the court[33] and

[30]Barr v. Phila., 191 Pa. 438.

[31]Sect. 1, Act of May 11, 1897. P. L. 53.

[32]Keppleman v. City of Reading, 14 Dist. 61.

[33]Bruce v. Pittsbung, 166 Pa. 152; Witherop v. Titusville School Board, 7 C. C. 451. The act of 1874, required that the tax should be "equal to at least 8 percentum" of the principal of the debt. That 8 percentum of annually will more than pay the loan in the time it runs, 30 years, is no reason for disregarding the mandate, 166 Pa. 152.

if issued, there can be no recovery upon it.[34] A provision in the ordinance directing the making and sale of the bonds, to the effect that until the bonds shall be fully paid "there shall be levied, assessed and collected annually and at the same time and in the same manner that other taxes are collected, a tax sufficient to pay the interest on said bonds, and also 3½ per cent of the total amount of such bonds, to be appropriated and applied as a sinking fund for the payment of said bonds, when and as they may become due and payable," is not equivalent to the levy of such a tax. It is a mere promise to levy such a tax.

ESTOPPEL AGAINST ALLEGING THAT NO TAX WAS ASSESSED

If before a sale of bonds, the borough files the statement in the office of the clerk of quarter sessions, to which elsewhere we have made reference, and therein avers that it has levied a tax for and adequate for the payment thereof, stating the tax, the buyer of the bonds may enforce them, although in fact an adequate tax had not been assessed.[35]

REDEMPTION OF BONDS IN INSTALMENTS.

Payment of the principal of the debt not more than 30 years after its formation must be provided for; but it is not necessary that it be made redeemable, annually, in installments, the last not deferred more than 30 years. The municipality has a discretion whether to make it thus partially redeemable at intervals within the 30 years, or to postpone redemption, altogether, to the end of 30 years. Instead of paying off any portion of the bonds within 30 years, a sinking fund may be accumulated by the fruits of the taxation. The "intent of the act is that a certain sum shall be annually raised in anticipation of payment, and whether paid out in redemption of the bonds annually, or paid into the inviolably pledged fund annually, to be paid out for the bonds in 30 years, it is, within the the meaning of the act, applied annually to the redemption of the bonds."[36]

INADEQUACY OF TAX.

If the tax is sufficient, at the issue of bonds, to provide for their payment in the lawful time, the occurrence of circumstances

[34]Rainsburg Borough v. Fyan, 127 Pa. 74. But there can be a recovery of money paid to the borough.

[35]Bell v. Waynesborough, 195 Pa. 299. So, the bonds having issued, they may properly be taken up by a fresh issue of bonds.

[36]Bruce v. Pittsburg, 166 Pa. 152.

subsequently, which so reduce the amount yielded by the tax, as to render it inadequate, will have no effect upon the validity of the bonds. "Thus if a city" says Mitchell, J., "at the time of making a contract levies a special tax in good faith supposed to be adequate to meet it, but in consequence of fire or flood or decline in values the result is an insufficient fund, it cannot be held that the contract, good at its inception, would thereby be made bad."[37] A bill in equity to restrain Scranton from issuing bonds in 1904, the first semi-annual interest upon which fell due on Jan. 1, 1905 was filed, on the ground that the tax provided would not produce any means of paying that installment of interest since the tax would not be collected until late in the year 1905. The injunction was refused because (a) it had complied with the law in getting ready to issue the bonds and (b) the city had other means for paying the interest of Jan. 1, 1905. The premium obtained on the sale of the bonds was sufficient.[38] The subsequent appropriation of the proceeds of the tax to other uses, could not impair the bonds to whose payment it should have been applied. Hence, bonds having been issued with a tax providing moneys to be used in paying them, the diversion of these moneys does not impair the validity of the bonds, and a new issue of bonds is permissible to take them up.[39]

WHEN PROVISION FOR TAX IS UNNECESSARY.

There are functions which municipalities must perform, even though they incur a debt for a time, in performing them. If the revenues that may reasonably be expected to come in, under existing taxes, during the year will be sufficient to extinguish this debt, a special provision by tax, at the creation of it is unnecessary. A county must meet the expenses of the courts, jurors fees, etc. The annual tax is not collected until the later part of the year. It is desirable, if not necessary, to pay the juries and others promptly. It may be necessary in order to do this, to borrow the money. The county may therefore borrow, issuing a promisory note or a bond for it, if it will be able to repay the money, from the revenues of the years; and it will not be obliged to consume these revenues of the year, in extinguishing debts for ordinary expenses, that have accrued in earlier years. The constitutional and statutory requirement that a

[37]Addyston Pipe Co. v. City of Correy, 197 Pa 41.
[38]Jermyn v. Scranton City, 212 Pa. 598.
[39]School District v. Lamprecht Bros. Co., 198 Pa. 504.

special tax shall be levied, of at least 8 percentum of the debt, refers only "to such debts as cannot be paid out of the ordinary and regular taxes or other available revenues within the year." It would be folly to assess a special tax for the payment of money for whose payment the existing assessments are sufficient.[40] The 8th section of Article IX of the Constitution, which requires the assessment of an annual tax, at the creation of a debt, which shall be sufficient in 30 years to pay the debt, cannot be applied to the incidental and ordinary expenses of making and repairing turn pike roads. The indebtedness therein referred to is such as may arise from some contract of the municipality itself, and which, for some definite period, is to be interest-bearing.[41]

THE CONSTITUTIONAL REQUIREMENT OF TAX.

The 10th section of Article IX of the constitution provides that "Any county, township, school district or other municipality incurring any indebtedness, shall at or before the time of so doing, provide for the collection of an annual tax sufficient to pay the interest and also the principal thereof within 30 years." A contract by a borough for an electric light plant, which would involve a debt of $4,968.50, the current revenues of the borough applicable to which not being more than $1900, would need to be accompanied by a provision for this tax.[42]

LIMITATIONS ON THE TAXING POWER.

The existing limit upon the taxing power of the municipality is not the measure of the debts which it may create. A borough, e. g. having the power by special act to tax to the amount of 10 mills on the dollar, the proceeds of which tax would be consumed in meeting the ordinary expenses, it is not for that reason precluded from erecting water works, although, to do so, would require an additional assessment of $3\frac{2}{3}$ mills. The authority to

[40]Commissioners of Schuylkill County v. Snyder, 20 Pa. C. C. 649. Koch, J., says the municipality may anticipate to some extent the collection of its annual revenues. Otherwise boroughs and school districts would during tIe first year of their existence be obliged to file a statment in the office of the clerk of Quarter Sessions every time they purchased a ton of coal or a box of chalk.

[41]Lehigh Coal v. Navig. Co's. Appeal, 112 Pa. 360; Davis v. Doyles town, 3 C. C. 573.

[42]Davis v. Doylestown Borough, 3 C. C. 573. The making of the contract, without such provision, will be enjoined.

increase the debt involves the right to increase the tax.[43] Blairsville, by its charter was authorized to levy a tax not exceeding one percentum on assessable property unless some object of general utility should require the same, in which case the consent of the inhabitants in voting, must be obtained. The borough undertook the erection of a market-house and a town-hall. A tax of one percentum would yield only $1500. The estimated cost of the improvements was $4000. A bill filed to restrain the borough authorities was dismissed.[44]

SPECIAL AND GENERAL PRIOR LIMITATIONS ON DEBT-MAKING POWER.

The act of June 9, 1891 P. L. 252,(3 Stewart's Purd. 2723) enacted to carry into effect section 8, Art. IX of the constitution, provides that " The indebtedness of any county, city, borough, township, school district or other municipality or corporate district, in this commonwealth, may be authorized to be increased to an amount exceeding 2 percentum * * * with the assent of the electors, duly obtained at a public election, etc." This repealed the limitation of debts to $1.00 on every $100 of the assessed value, or the limitation of debts to $10,000, in the borough of Bristol.[45] The limitation of the debt of Pittsburg to $1,150,000, imposed by the local act of April 6 1850, (P. L. 408) is repealed by the constitution and the act of April 20, 1874, (whose terms are in part repealed by the act of June 9, 1891.)[46] The 66th section of the act of Feb. 12, 1869 (P. L. 150) which prescribed $50,000 as the maximum indebtedness of any sub-school district in Pittsburg, is repealed by the act of April 20, 1874.[47] The act of April 9, 1868, after authorizing the borrowing of money by county commissioners for the erection of public buildings, provides that before the loan is contracted, the commissioners shall present a statement of the financial condition of the county to the

[43]Howard's Appeal, 162 Pa. 374; Appeal of City of Wilkes-Barre, 116 Pa. 246.

[44]Emerson v. Blairsville, 2 Pittsb. 39.

[45]Dorrance v. Bristol Borough, 224 Pa. 464. More accurately the $10,000 limitation was repealed when Bristol fell under the general borough act, and the other limitation is repealed by the act of 1901.

[46]Bruce v. Pittsburg, 166 Pa. 152.

[47]Chalfont v. Edwards, 176 Pa., 67 Mellor v. Pittsburg, 201 Pa. 397. A contrary decision, reached in Hutchinson's Appeal, 4 Penny. 84, was erroneous.

court of Quarter Sessions, and secure the approval of such court for the loan. The approval of the quarter sessions of Wayne County of a loan, was refused by the court, [the president judge approved; the 2 lay judges refused]. The commissioners then resolved to proceed under the act of April 20, 1874. They filed a statement in the office of the clerk of Quarter Sessions, of a purpose to increase the debt, and they assessed a tax of 1¾ mills to pay the interest, etc. A bill was filed to restrain them from contracting the debt without the approval of the court of Quarter Sessions, and a special injunction was awarded. The supreme court affirmed, on appeal, except so far as the injunction restrained from levying and collecting taxes under the general system for levying and collecting county taxes for the building of a county court-house.[48] Under the acts of May 8, 1854 (P. L. 617), April 21, 1871 (P. L. 241) and April 7, 1873 (P. L. 64), school districts may contract loans for the purchase of grounds for school houses, and for the erection of the houses. The directors may borrow money not exceeding 5 per centum upon the last triennial valuation of property in the district, when authorized by the Common Pleas Court. Shay, J., reached the conclusion that these requirements were not repealed by the act of April 20, 1874 (P. L. 65), in so far as it provides for an increase of debt not exceeding 2 per centum, etc. The approval of the loan by the Common Pleas Court is necessary.[49]

ESTOPPEL.

As in other cases, the plaintiff who seeks an injunction may have estopped himself by his unreasonable delay in invoking the aid of the court, or otherwise. He may, e. g., be passive while the contract is being performed, and only at its completion intervene to prevent payment of the contractor. Ignorance of the making of the contract and of the doing of the work might excuse the delay.[50]

[48]Wayne County Commissioners' Appeal, 4 W. N. 411.

[49]Coal and Iron Co. v. Porter Township School District, 14 Dist. 581. But bonds being in the hands of innocent purchasers, and no proceedings having been begun until nearly three months after their issue to restrain such issue, the court will decree their issue *nunc pro tunc*, when the statement is presented to it.

[50]O'Malley v. Olyphant, 198 Pa. 525. The plaintiff resided elsewhere. No estopping facts were found in Luburg's Appeal, 1 Mona. 329.

REMEDIES FOR IMPROPER INCREASE OF DEBT.

A very common measure of redress for the illegal increase of debt is the filing of a bill in equity.[51] A tax-payer may, for himself alone,[52] or for himself and other tax-payers who may choose to unite with him,[53] file this bill. Seventeen citizens and tax-payers of a county filed a bill to restrain it.[54] Various grounds for the injunction are alleged, e. g., that the borough has no power to build the water works, etc., in the building of which the debt will arise;[55] that, in the popular vote, proper ballots were not used;[56] that the proposed debt being beyond 2 per centum, its creation has not been submitted to the people;[57] that the ordinance providing for the vote, submitted the contraction of several distinct debts for as many objects;[58] because the vote was not counted by the court;[59] because an 8 per cent tax was not assessed before issue of the bonds;[60] because the ordinance providing for the debt was defective.[61] These are only some of the reasons urged for an injunction. Sometimes the injunction is against the making of the contract for the work which will involve the creation of the debt, e. g., the erection of a water plant,[62] or the

[51]Dorrance v. Bristol, 224 Pa. 464; Bloomsburg Town Election Case, 18 C. C. 449; McKinnon v. Mertz, 225 Pa. 85.

[52]McLaughlin v. Summit Hill Borough, 224 Pa. 426; O'Malley v. Olyphant, 198 Pa. 525; Keller v. Scranton, 220 Pa. 130.

[53]Sener v. Ephrata Borough, 176 Pa. 80; Wade v. Oakmont Borough, 165 Pa. 479; Clark v. Luzerne Borough, 196 Pa. 210; Peffer v. Phila., 181 Pa. 566; Reting v. Titusville, 175 Pa. 512.

[54]Brown's Appeal, 111 Pa. 72. The Quarter Sessions where the borough statement is filed, as required by the act of April 20, 1874, has not jurisdiction over the subject of increasing the debt. Hence, a remonstrance filed in that court, against the borough's proceeding to increase the debt, will be stricken off.—Laird v. Greensburg, 8 C. C. 621.

[55]Dorrance v. Bristol, 224 Pa. 464.

[56]McLaughlin v. Summit Hill Borough, 224 Pa. 425; Evans v. Williston Township, 168 Pa. 578.

[57]McKinnon v. Mertz, 225 Pa. 85; Brown v. City of Corry, 197 Pa. 41.

[58]Bloomsburg Township Election Case, 18 C. C. 499.

[59]Clough v. Shreve, 10 C. C. 398.

[60]Bruce v. Pittsburg, 166 Pa. 152.

[61]Clark v. Luzerne Borough, 196 Pa. 210.

[62]Dorrance v. Bristol Borough, 224 Pa. 464.

issue of bonds,[63] or the payment of a debt improperly contracted,[64] or the collection of a tax for that purpose.[65]

RATIFICATION BY VOTE.

A debt may be created in excess of 2 per centum without a vote of the people. It will be unenforceable against the municipality, because made in excess of the power of the council of city or borough, of the school directors of a school district, of the supervisors of a township, of the commissioners of a county. But their act is capable of validation by a subsequent ratification by the voters. If the voters are asked to vote upon the issue of bonds, to take up an earlier debt not in the form of bonds, or an earlier issue of bonds, their assent to the issue will give validity to it, and to the application of its proceeds to such earlier debt.[66] "As they" [the voters],says Stewart, P. J.,"could have authorized the debt in the first instance by giving their agents power to contract it, they unquestionably have the right to affirm and ratify it when contracted without their previous assent, by like action on their part, as was required to give the power originally."[67] A mortgage in excess of 2 per cent, made without authority of the electors, may be subsequently ratified by their vote.[68]

CONCLUSIVENESS OF JUDGMENT.

The invalidity of the debt, for whatever reason, should be pleaded as a defence to the action for the recovery of it. A judgment, whether in the Common Pleas or before a justice of the peace, against a township, etc., is conclusive of the soundness of the debt. The debt cannot be attacked, collaterally. e. g., in an application for a mandamus to compel the levy of a special tax, from whose proceeds to pay the debt. Where there are many judgments, the mere fact that their aggregate exceeds 2 per centum is not decisive that the debts were improperly contracted. The debts may have originated before January 1, 1874; or they

[63]McLaughlin v. Summit Hill Borough, 224 Pa. 425; Sener v. Ephrata Borough, 176 Pa. 80.

[64]Howard v. Olyphant Borough, 181 Pa. 191; O'Malley v. Olyphant, 198 Pa. 525.

[65]Wade v. Oakmont Borough, 165 Pa. 479.

[66]Roye v. Columbia Borough, 192 Pa. 146.

[67]Bell v. Waynesborough, 195 Pa. 299; School District v. Lamprecht Bros. Co., 198 Pa. 504.

[68]Stevenson v. School District, 6 Lack Jur. 264.

may have had the approval of the electors; or the assessed valuation of the township may have been higher than it is now; or the township may have sufferred a diminution of area.[69]

EFFECT OF VIOLATING THE STATUTE ON THE DEBT.

When a debt is contracted in violation of the constitution and the statutes, it is void. There can be no recovery upon it, even by a *bona fide* purchaser of it, although it is negotiable in form,[70] but if the debt, for which a bond has been issued, was valid, although, the bond being invalid because improperly issued, there can be no recovery upon it, there may be a recovery upon the debt.[71] If debts have been gradually contracted, the last without the vote of the people making the total debt more than 2 per centum, the part of the debt created, in excess of 2 per centum, will be void, and the rest valid; but if bonds are then issued for the entire debt, there being no vote of the electors, the entire issue will be void, since it is impossible to distinguish the sound from the unsound debt, which they represent.[72] A debt will be altogether void, if by any amount it exceeds, or, added to the pre-existing debt, it causes that to exceed, 2 per centum and it has not been authorized by a vote of the people. A debt of a school district having, without popular vote, been increased about $1000 beyond the two per centum, the court refused to think that so slight an increase should be tolerated. "We hold" said Edwards, P. J., "that once it is clearly shown a school district has increased its indebtedness beyond the con-

[69]Plains Township's Appeal, 21 Super. 68. In Lehigh Coal and Navigation Co.'s Appeal, 112 Pa. 360, the court, it was said, could make an order on the supervisors to levy a special tax for the payment of debts, because the debts had been fixed by judgments of a justice of the peace "and as the indebtedness does not appear to have exceeded the amount allowed by the 8th section of the 9th article of the constitution." What, if it had appeared?

[70]Millerstown v. Frederick, 114 Pa. 434; Mathews v. Scranton City, 7 Luz. Lg. Reg. 127. In Pike Co. v. Rowland, 94 Pa. 238, a recovery on the bond was allowed, the debt not having been increased beyond two per centum.

[71]Rainsburg Borough v. Fyan, 127 Pa. 74. The money obtained for void bonds belongs to the people who paid it. They can demand it in equity and good conscience. Hence this money cannot as an asset be deducted from the gross debt, in determining the borrowing power; Luburg's Appeal 1. Mona. 329.

[72]Millerstown v. Frederick, 114 Pa. 434.

stitutional limitation, an injunction must be allowed. Whether the excess is $100 or $1000 or more, makes no difference."[73]

NOT AN INCREASE OF DEBT.

The act of May 31, 1907, (P. L. 355,) authorizes cities and boroughs to acquire water works heretofore owned by a private corporation, a firm or an individual, at an appraisement. For the purpose of making the purchase, the city, etc., may issue bonds, "which shall be secured solely by such water works, system and property, and the revenues thereof, to an amount not exceeding the appraisement of the value fixed by the said appraisers or the court. The proceeds of the sale of such bonds shall be used exclusively for the purpose of making payment for the property so acquired."[74] Since the holders of the bonds must look exclusively to the water-works, it is doubtful whether the issue of them increases the debt in the constitutional sense.[75] Norristown contracted with Andrew Carnegie to levy a tax which should raise annually $5,000 for the support of a library, and he agreed to pay the cost $50,000 of a library building. The act of June 28, 1895 (P. L. 411), authorizes boroughs and cities of the third class to establish free libraries, and to impose a tax, not exceeding one mill upon the valuation, for that purpose. Edwards, P. J., refused to discover in this contract an increase of indebtedness. To increase the tax is not to increase the debt. But was there not a contract here to increase the tax? And, if that contract was broken, would not a debt to Andrew Carnegie arise in the form of damages?[76] On July 19, 1900, an ordinance was passed to issue bonds in order to provide a fund for the purchase of land for municipal buildings, and for the purchase of fire apparatus. The bonds were not issued until October 23, 1900. On July 12, 1900, an ordinance had been passed authorizing the construction of a sewer, and on August 25 the borough made the contract for its construction. The debt created by the issue of the bonds, October 23, 1900, cannot be considered as a debt existing when the sewer contract was made, although the ordinance

[73]Dolan v, School District, 10 Dist. 694.

[74]Section 5.

[75]Fleetwood Water Company v. Borough of Fleetwood, 1 Berks 69.

[76]Sheetz v. School District, 17 Mont. 209. The court thinks that the borough might be compelled by mandamus to levy from year to year the increased tax. But, is not this necessity to levy increased tax the very objection to the creation of debts?

authorizing it had already been passed, so as to require the creation of the sewer debt to be submitted to the people.[77] If separate contracts are made with different persons, with A for lumber to be used in a schoolhouse, with B for the bricks, with C for the plastering, etc., and the contract made with A will not itself increase the debt beyond 2 per centum, although the later contracts do, A's debt will be valid, although not submitted to the voters, if he did not know that his contract was one of several, to be made in the erection of the schoolhouse, and that the sum of the debts arising from these contracts would exceed 2 per centum. If A knew of the purpose to make the other contracts, it would seem, says Rice, P. J., that he "ought to stand or fall with the other creditors," knowing that the contract with him "was part of an illegal transaction, although it standing alone, might not constitute an illegal increase of the indebtedness."[78]

FUNDING.

Bonds issued for the purpose of funding a floating debt, or for the purpose of taking up outstanding bonds, if actually used for these objects, are not an increase of the debt of the municipality but only a change of its form. Hence, bonds issued, since Jan,1, 1874, when the present constitution went into operation, for the purpose of extinguishing and actually used in extinguishing, a debt originating before that date, are not to be considered, in determining whether the city has, since that date, increased its debt to 2 per centum of its valuation, so that a further increase will require a vote of the people.[79] A county[80] or other municipality may issue bonds for the funding of a floating debt; by so doing it simply changes the form of the debt without increasing it. The fact that some of the floating debt arose in 1894, some in 1895, in 1896, and in 1897 and that considerable portion of the

[77]Redding v. Esplen Borough, 207 Pa. 248.

[78]School Districtv. Shortz, 2 Penny. 231. If the various contracts are made simultaneously, and the effect of all is to create a debt in excess of 2 per centum, they all would be void, Cf. Dolan v. School District; 10 Dist. 694.

[79]Hirt v. City of Erie, 200 Pa. 223. The city had issued bonds, since Jan.1, 1874, to the amount of $1,344,200, but all of the sum, except $152,-100. was issued in refunding bonds issued prior to 1874. Since $152,100 plus $70,000, the proposed increase, would not be 2 per cent of the valuation, the proposed increase did not need a vote of the people.

[80]Snyder v. Kantner, 190 Pa. 440; Cf. Davis v. Braddock Borough, 48 Pitts. 145.

taxes assessed those several years, are still, in 1896 uncollected, will not induce the court to prevent the issue of bonds there being no evidence of the amount of the uncollected but still collectible taxes of these years, or the amount of floating debt arising in each of them.

If the debt to be funded or refunded is itself invalid, because though in excess of 2 per centum, it was not authorized by the people, the funding or refunding would be invalid, unless so authorized by the people,[81] but the authority of the people would give validity to the bonds.[82]

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[81]Millerstown v. Frederick, 114 Pa. 435; Cf. Cox v. Connellville Borough, 22 C. C. 657.

[82]Roye v. Columbia Borough, 192 Pa. 146; School District v. Lamprecht Bros. Co., 198 Pa. 504.

MOOT COURT

COMMONWEALTH V. TREAT

Use at Trial, of Admissions of Counsel at Hearing before Justice

STATEMENT OF FACTS.

Treat, being on trial for forgery, the Commonwealth, in order to show that he executed the forgery, offered proof that at the hearing before the justice, Treat's counsel admitted that he executed the document, for the purpose of avoiding a continuance of the hearing until the Commonwealth could command the witness on whom it relied to prove the execution. The evidence was admitted, and Treat was found guilty. Motion for a new trial.

MORGAN, for Commonwealth.

REICHELDERFER, for defendant.

OPINION OF THE COURT.

COOK, J.—Admissions in the law of evidence have been defined as being concessions or voluntary acknowledgments made by a party of the existence of certain facts and have been said to be direct, or express, implied or indirect or incidental, and either judicial or extra-judcial.—16 Cyc. 938.

This was, we think, a judicial admission.

Judicial admissions are those made in court by a party's attorney and generally appear either of record as in pleading or in the solemn admission of the attorney made for the purpose of being used as a substitute for the regular legal evidence of the fact at trial, or in a case stated for the opinion of the court.—Greenleaf, p. 205.

Judicial admissions are frequently those of counsel or attorneys of record. When these are made in good faith by counsel in his professional capacity for the purpose of dispensing with the evidence and to that end are distinct and formal, they bind the client whether made before, in or after the trial.

It is considered that the original concession may well have been made for other reasons than because it states the fact truly, for example, to save time, or to avoid a continuance.—16 Cyc. 965. The attorney is acting in capacity of an agent for his client.

Where one has been authorized to act as the agent of another, his declarations and representations made in relation to and in connection with, the business of his agency, and while employed therein and within the scope of his authority in relation thereto are admissible as evidence to bind his principal.—P. and L. Vol. 6 Col. 9634.

According to the authority above cited that the prisoner is bound by judicial admissions made by his counsel though they may afterwards be

used as evidence against him, we think there was no error in admitting the evidence. In this case the evidence was judicial notice and used simply for the purpose of having a continuance.

On the further principle that admissions of an agent bind his principal since the relation of attorney and client is in fact that of principal and agent, there is a double ground for admitting this evidence.

We therefore direct the motion for a new trial to be stricken off.

OPINION OF SUPERIOR COURT.

The commonwealth would have been obliged to ask for an adjournment of the hearing before the justice, in order to be able to command the presence of a witness, had the defendant's counsel not admitted the fact to be proved by this witness, namely the defendant's execution of the document. By this admission the commonwealth procured the commitment of the defendant for trial, the object of the hearing. Not content with the accomplishment of this object, it now, at the trial, strives to use the admission again,—no longer to put the defendant on trial, but to convict him at the trial. So far as appears, it has had time and opportunity to secure the presence of the witness whose absence at the hearing induced the making of the admission.

The defendant may have been willing to concede as a fact the truth of an allegation, for the purpose of expediting the preliminary hearing which should issue in his being remitted to a trial by jury without being willing to *concede* the truth of this allegation before the jury itself.

It cannot be said that the commonwealth has been misled into omitting to obtain other evidence of the defendant's execution of the document, and that, for this reason, it should be allowed to use the admission made at the hearing. The commonwealth should have known that the admission made would not be receivable without the consent of the de fendant. It should before the trial at least have obtained the explicit consent of the defendant to its use of the admission. There would then be some plausible ground for alleging that the prisoner had estopped himself from objecting to the reception of his admission.

That an admission of a fact may be made without impliedly asserting that the fact occurred, is evident. Denial, under the circumstances, may be useless. The advantage to be gained by denial may not compensate for the attendant disadvantages. The prisoner may think it less irksome to allow the committing magistrate to assume that he executed a document, and instantly dispose of the case, than to compel himself to appear again at a postponed hearing, as he will if he refuses to admit the execution.

It may be said that the admission should be received as evidence, and that the jury should be allowed to decide what weight should be attached to it, their attention being called to the infirmative considerations. That view is not wholly illogical. We think it safer, however, to exclude the evidence altogether, and to compel the prosecution to furnish the evidence on which it would have been compelled to rely, had the provisional admission not been made.

It is not prudent to extend the range of cases in which statements of counsel, in criminal cases, shall affect the prisoner. The counsel may

have made the admission without consultation with his client, on his own view of the wisdom of terminating promptly the preliminary investigations. The client may not have realized the later uses to which the prosecution would seek to apply the admission. Indeed the attorney may not have done so.

In Rex v. Thornhill, 8 Car. & P. 575, Abinger, C. B., declined to allow an agreement between attorneys, made before the trial, that formal proof should be dispensed with by the crown, to be used, saying that the admissible admission must be made *"at the trial"* by the defendant or his counsel. In Weisbrod v. R. R. Co., 20 Wisc. 421, admissions at a former trial were excluded. Cf. also, Harden v. Forsythe, 99 Ill. 312; Cutler v. Cutler, 130 N. C. 1, 40 S. E. 689. In State v. Butler, 151 N. C. 672, 65 S. E. 993, an admission at the preliminary hearing to prevent a continuance, was not allowed to be heard at the trial. Cf. State v. Bryant, 93 Mo. 273. In Padgitt v. Moll, 159 Mo. 143, 60 S. W. 121, a statute provided that if the opposite party will admit what an absent witness would swear to, as set out in an affidavit that he would swear thus and thus, the case shall not be continued, but the party moving for the continuance may read the affidavit as evidence. It was held, however, to be error to allow the use of this affidavit at a trial later than that contemplated, when the continuance was asked for. "The admission, under such circumstances, does not stand for all time, but ceases when the emergency ceases." In Ryan v. Beard's Heirs, 74 Ala. 306, it is said such an admission [that the absent witness would swear so and so] "is not an admission of his competency nor of the relevancy of the facts as evidence, nor is it admissible for any purpose on a trial at a subsequent term, although the witness has since died."

It was error, therefore, in the trial court, to allow the commonwealth to employ the admission of the defendant, made at the preliminary hearing, as evidence that he executed the document of whose forgery he is accused.

Judgment reversed with *v. f. d. n.*

COMMONWEALTH V. PAYNE

Homicide. Killing to Prevent the Victim's Killing.

STATEMENT OF FACTS.

Payne attacked Peppard with the intention of killing him. During the strugle which ensued Payne repented of his intention to kill, but the fight was so fierce that he could not retreat, and had no means whereby to convey to Peppard the fact that he had relinquished his intent. Payne's brother came along and thinking that his brother was in serious danger shot and killed Peppard in order to save his brother's life.

MENDELSOHN, for Commonwealth.

ROOKE, for defendant.

OPINION OF THE COURT.

PUDERBAUGH, J. There are two questions presented to the court in this case. First, whether the aggressor in an affray may after forming the intention to kill, withdraw that intention, and without any outward sign or action to convey such intention to the other party and then kill his opponent in defence of his own life? In answer to this we say that he cannot.

When one who has provoked a combat abandons or withdraws from same in good faith, and not merely for the purpose of gaining an advantage, and by his conduct clearly shows his desire to decline any further struggle his right of self-defence is restored, and he is justified in killing his adversary, to save himself from death or great bodily harm. But the aggressor's mere willingness to withdraw is not sufficient; he must both endeavor to really and in good faith withdraw from the combat and must also in some manner make known his intention to his adversary. If the circumstances are such that he cannot notify his adversary it is the assailant's fault and he must take the consequences.—21 Cyc. 810, (and cases there under cited).

So, if Payne had killed the deceased, it is very clear that he would have been guilty of murder even though he had in good faith withdrawn his intent.

The second question presented is: The prisoner having come upon the scene and, not knowing the situation of either party, and seeing that his qrother was in grave danger of losing his life, having shot and killed the man whom his brother had first attacked, is he also guilty of murder?

Blackstone in his Commentaries, 4 Blackstone, 186 says. "Under excuse of self defence the principal civil and natural relations are comprehended; therefore master and servant, parent and child, husband and wife, killing an assailant in necessary defense of each other respectively are excused; the act of relation being construed the same as the act of the party himself."

"The general doctrine in this class of cases is, that whatever one may do for himself he may do for another. The common case is where a father, son, brother, husband, servant or the like protects by his arm the feeble. Though distinction and doubts have been taken, the better view plainly is that we may do for another whatever the other may do for himself."—Bishop's Criminal Law, 665.

"The right to defend another, however, can be no greater than the right of another to defend himself; so that if a person brings in a difficulty, so that he could not, if he killed his opponent set up the plea of self-defense, his brother, if he kills him cannot set up the same plea." —Clark Criminal Law, p. 186.

A person may also be justified or excused in killing in defense of his or her parent, husband and wife, child, or brother and sister. The rule also permits one to kill in self-defense of his master or servant; or even to prevent the commission of a felony by violence or surprise upon a stranger, always provided the circumstances are such that the person defended would be justified or excused in killing in his own defense.

To justify or excuse a homicide in defense of another it must at

least be reasonably apparent to the slayer that the person defended is in imminent danger of death or great bodily harm, and that it is necessary for him to use the means or force which results in death in order to prevent them. And although it has been held that if the defender has a good motive or intention, it is immaterial that the person is not altogether blameless; but by the weight it is necessary that neither the person nor defender shall be at fault in bringing in difficulty or that if he has provoked the attack he shall in good faith withdraw before the killing.—21 Cyc. 826, 827, 829.

Although there are some cases contra, the preponderance of authority is such as will warrant a conviction.

Since Payne the aggressor would have been guilty of murder had he killed the deceased in defense of his life his brother is placed in the same position by his killing of the deceased.

OPINION OF SUPREME COURT.

John Payne assaulted Peppard with a murderous intent, but changed his purpose. Peppard not knowing of this changed purpose, continued to press Payne in a manner which boded death to Payne, but which was warranted by Peppard's reasonable apprehension of death from Payne, if he did not so press Payne. Had Peppard killed Payne, the homicide would have been innocent.

William Payne came on the scene, and, witnessing the combat, could reasonably infer that Peppard was about feloniously to kill John, and that a severe corporal injury to Peppard, probably a fatal injury, could alone prevent his killing John.

We take the law to be that anybody, *bona fide* believing "that a violent felony is in the process of commission, which can only be arrested by the death of the supposed felon" commits an excusable homicide when he kills the supposed felon.—1 Wharton Crim. Law, p. 473; Cf. 1 Bishop Crim. Law, 511; 1 McClain Crim. Law, 266.

To the suggestion that the felony must in fact be in process of perpetration, the observations of Wharton are a pertinent reply: "We may correctly accept, in this as well as in the analogous case of self-defense, the position that if A, honestly and without negligence on his part, believes that B is in the process of committing a violent felony which can only be arrested by B's death, A is excused in killing B."

The learned court below has considered the case as one of self-defense on the part of John Payne, and has applied the principle that what John could legally do, in defending himself, his brother William could do, but that when the facts deprive John of the right to defend himself, at the expense of the life of Peppard, they will deprive his brother William of the right to defend him, by killing Peppard.—21 Cyc. 826, 828; Sherrill v. State, 138 Ala. 3, 35 So. 129; Bostie v. State, 94 Ala. 45; Cain's Case, 20 W. Va. 679; State v. Greer, 22 W. Va. 800 (apparently not disapproved in Snurr v. State, 4. N. E. 445.) In Crockett v. Commonwealth, 38 S. W. 674 (Ky.), it is held that a brother is guilty who kills the assailant of his brother, if the assailed brother "had sought and brought on the difficulty in which the killing was done." This view is

accepted by McClain, 1 Crim. Law, 285; Clark, Crim. Law, 186; 1 Wharton, Crim. Law, 471. It is asking much of a brother, A, who sees his brother, B, about to be killed by X, to ask him to refrain from assisting B by disabling, by killing X, if B, the imperiled brother, has put himself into the predicament by his own unlawful act, and he, A, knows that B has done so. The ordinary brother will rush to the defense of his brother from death, by whatever improper acts he may have exposed himself to it. Some concession ought to be made to this affecting and noble trait of human nature, and to hold the rescuing brother guilty of malicious killing when he kills merely to save the life of his brother, would be unnecessary harshness.

It would be barbarous to hold that when A, honestly thinking his brother B, without fault on his part, assaulted by X with intent to kill him, interposes and kills X, he is liable as a murderer, if in fact B's fault had put him in peril from X's attack.

We think that if Wm. Payne not unreasonably thought Peppard the assailant, and his brother innocent of wrong, he should be acquitted of any crime. If he knew even that John had provoked the assault, by murderously assailing Peppard, and interposed, not to promote John's object of slaying Peppard, but to rescue John from a self-produced peril, being actuated by affection for his brother, and not by anger, revenge, hate, retaliation, or other improper feeling towards Peppard, he ought to be guilty of nothing more than voluntary homicide. The poignant horror at the impending death of a brother ought to be deemed sufficient "provocation" for the act to make it non-malicious. Although anger is the passion which the provocation usually elicits, which leads to the act called voluntary manslaughter, "yet any other passion, as sudden resentment, or terror, rendering the mind incapable of cool reflection, may reduce the grade of the crime" of homicide (21 Cyc. 737); and a violent attack on a friend or relative in the presence of A may so excite A as to make a lethal attack by him on the assailant non-malicious (Cyc. 750). Had John Payne been killed by Peppard in sight of William, and had William thereupon in horror and indignation killed Peppard, he would have been guilty only of voluntary manslaughter (1 Wharton Crim. Law, p. 446). Why should he be guilty of more, if he killed Peppard, not for an irreparable killing of his brother, but for the purpose of preventing the killing of his brother?

Doubtless, A *ought* to let X kill his brother B, if that is necessary to save him (X) from being killed by B, but human nature cannot be expected to do everything that it ought to do, and a state would be savagely sanguinary that would put A to death, because, seeing the death of his brother, B, or of X necessary, he intervened to cause the death of X.

Extenuation of his conduct would not be possible, of course, if he had contrived the necessity of the alternative death of B or X. The case before the court below was not such. John Payne had no share in producing the situation. He found the alternative already made for him of X killing his brother or of his killing X. He must not be too severely punished because, in such an emergency, he yielded to the impulses of brotherly affection, and sent to Hades the man who was about to become —however innocently—his brother's slayer.

In conclusion, the jury should have been told to acquit the defendant if they found that Peppard was about to kill his brother and that without negligence he believed that the killing would be a felony, and to acquit of any homicide above manslaughter, if they found that Peppard was even negligently convinced that Peppard's killing would be felonious; or even if he knew that under the circumstances, Peppard's killing his brother would have been justifiable, if the defendant's act was done suddenly, and from the mere desire to save his brother's life.

COMMONWEALTH V. ALLEN

Homicide.—Duty to Retreat.—Killing to Prevent Killing.

STATEMENT OF FACTS.

James and John Allen were brothers. They lived at the house of their father Thomas Allen. On Jan. 1, 1910, John, without provocation, made an assault upon James under such circumstances as to justify James in believing that John intended to kill him. The assault was committed within the house of Thomas Allen and James could have avoided all danger by retreating from the house. He did not, but remained in the house and killed his brother in order to prevent his brother from killing him.

WATKINS, for Commonwealth.

O'BRIEN, for defendant.

OPINION OF THE COURT.

BADGER, J. The question here is whether the circumstances were such as to justify James' killing his brother, or was he bound to retreat. We are of the opinion that the rule as regards the defense of the home has no application in this case and can be dismissed, for in Commonwealth v. Johnson, 213 Pa. 432, where the house was the property of the prisoner's wife, who was also the mother of the deceased, and both were members of the family, with the right to be in the house, the prisoner was charged with murder of deceased, and it was there held that the ordinary rules as to self-defense were alone applicable, and that the rights of a householder against a violent intruder had no relevancy. This leaves us confronted with the two propositions, (1) as regards the ordinary rules of self-defense, and (2) as to the ingredients of the degrees of murder.

To justify a killing in self-defense there must be a reasonable belief that there is no other means of escape from death or great bodily harm. (Com. v. Johnson, 213 Pa. 432.) The belief that there will be a little more danger by retreat is not a sufficient justification, nor is the belief that the attack will occasion a mere scratch or some slight personal injury (Com. v. Breyessee, 160 Pa. 451). And as long as there is a possible means of escape, it must be taken advantage of (Logue v. Com., 38 Pa. 265); for to excuse a homicide by plea of self-defense, it must appear that the slayer had no other, or at least probable, means of escaping, and that his act was one of necessity (Com. v. Drum, 58 Pa. 9). The law is

well settled that a man may not kill another in self-defence if he have other probable means of escape (Com. v. Ware, 137 Pa. 465). The fact that the prisoner in the case at bar had ample opportunity to retreat and thereby avoid all danger is unquestioned. His plea of self-defense has, therefore, not entitled him to an acquital, since perhaps the most essential element to its maintainance is wanting. This brings us to the question as to the extent of his crime; is it murder in first or second degree, or is it simply manslaughter? All homicide is presumed to be murder until the contrary appears in the evidence; and the burden of reducing it to manslaughter is on the accused. But such presumption is no higher than that the homicide is murder in second degree; and it lies on the Commonwealth to establish the facts and circumstances which constitute murder in first degree (Com. v. Drum, 58 Pa. 9). Malicious causation of death is murder. Non-malicious causation of death is manslaughter. Of murder there are two sub-classes, murder of 1st and murder of second degree. Malice is the common quality of both of these degrees, and its presence or absence determines whether the criminal homicide is murder or manslaughter (Vol II Trickett Crim. Law 766). Murder which shall be perpetrated by means of lying in wait, or by any other kind of willful and premeditated killing, or which shall be committed in the perpetration of, or attempt to perpetrate, any arson, rape, robbery or burglary shall be deemed murder of first degree, and all other kinds of murder shall be deemed murder of second degree (Act March 31, 1860, Sec. 74, P. L. 402). Manslaughter is the unlawful killing of another without malice, either express or implied, which may be voluntarily upon a sudden heat, or involuntarily, but in the commission of some unlawful act (4 Blackstone's Com. 191). In determining whether a homicide is of second degree it is necessary to discover that there was malice, and that there was no intention to kill; and that the killing did not result from the perpetration of any of the four felonies (Vol. II Trickett Crim. Law 818). Express malice is said to be personal illwill and hatred or enmity towards the party killed (Brown v. Com. 76 Pa. 319). Implied malice is where there is no specific intent to kill, but one is possessed of a depraved heart, a wicked devilish disposition, regardless of all social duty and indifferent in his intercourse with others, whether he injures them or not (Com. v. Platt 11 Phila. 415). In Com. v. Drum' 58 Pa. 9, we find the following explanations of the terms used in defining first degree murder:—"In murder if an intention to kill exists, it is wilful; if the intention be accompanied by such circumstances as evidence a mind fully conscious of its own purpose and design, it is deliberate,—and if sufficient time be afforded to enable the mind fully to frame the design to kill and to select the instrument or to frame the plan to carry this design into execution, it is premeditated." The facts of the present case will not permit its falling within these boundaries as laid down to constitute murder in the first degree—the fully-formed purpose to kill is absent, and there is not that necessary time for deliberation and premeditation "which will convince the jury that this purpose is not the immediate offspring of rashness and impetuous temper, and that the mind has become fully conscious of its own design" (Com. v. Drum, 58 Pa. 9). The fact that a man

kills another upon a sudden attack repudiates the idea of deliberation and premeditation—even though the act be accompanied with malice, it lacks a fully formed purpose to take life. Pistorius v. Com., 84 Pa. 158, held that where the deceased approached prisoner in a threatening manner, so that the latter had a reasonable belief that he was in danger of bodily harm, and acting on that belief and apprehension of danger, fired a pistol shot and killed deceased, the crime was not murder in 1st degree, although the prisoner fired with intent to kill, and there was no occasion to take life in order to save his own or to avert great bodily harm.

To reduce an intentional blow, resulting in death, to manslaughter, there must be sufficient cause of provocation, and a state of rage or passion without time to cool, placing the person beyond the control of his reason and suddenly impelling him to the deed (Com. v. Drum, 58 Pa. 9). We believe that the attack in this case was not such a provocation as would throw the prisoner into such a state of passion as would justify his losing control of his reason. It has been held that the fact that a prisoner on trial for murder drew a pistol and fired a fatal shot upon the sudden impulse of an attack upon him and of blows received, and in consequence of rage thereby caused, was not sufficient to reduce the offense to manslaughter (Com. v. Ware, 137 Pa. 465). The prisoner at bar cannot be held for first degree murder or for manslaughter. But the elements of his crime bring it within the limits of second degree murder—it was not committed while in the perpetration of any of the four felonies, and that there was malice is shown by the fact that the prisoner, although he could have retreated and thus avoided all danger, chose rather to stand his ground and fire the shot which might or might not cause death.

OPINION OF SUPREME COURT.

The defendant claims that he was under no duty to retreat before killing his brother because (1) a man is not bound to retreat from his house; (2) the assault of his brother was made with murderous intent, and he was without fault himself.

That a man need not retreat from his own house, is admitted by the commonwealth to be a settled rule as between one who is the exclusive owner and an aggressor who has no right of entrance, but its application is denied as between those who have equal rights to be in the house. An examination of the history of the origin of the rule and of its development discloses facts which tend to support the contention of the commonwealth.—(Bishop's Crim. Law. 653.) But why, it may be inquired, should one retreat from his own house when assaulted by his co-tenant any more than when assailed by a stranger? Whither shall he flee, and how far, and when may he be permitted to return? He has a lawful right to be and remain in his house, and the legal nature and value of that right is not abrogated by its enjoyment in connection with another. Reasoning of this character impressed the court in Jones v. St. 76 Ala. 8, where it is held that the principle that a man need not retreat from his house applies as between partners, joint tenants and tenants in common. And in Wharton on Homicide, 492, it is said, " So a person in his own home has

the same right to stand his ground and kill in self defense when assaulted by a partner or co-tenant as when assaulted by a stranger." See also De Forest v. St., 21 Ind. 23.

The decision of the court below upon this point is, however, sufficiently justified by the Pennsylvania case cited, which is directly in point.

It is clear, under the authorities at common law, that when a person, being without fault, is murderously assaulted, he may stand his ground and slay his assailant (1 Hale P. C. 40, 1 East P. C. 271, Foster C. L. 273, Beale 326, Anon., Fitzh. Abr., Corone Pl. 284, Mikell 411). And this view is supported by the decisions of the courts of many states. See cases collected 25 A. and E. 272.

Other courts have refused to follow this rule and have held that the person assaulted must retreat in all cases, if he can safely do so, though the attack upon him may be felonious, and though he may himself be free from fault (25 A. and E. 272). This is the law of Pennsylvania (Trickett's Crim. Law 698, and cases cited).

It follows from these principles that the defendant's act in killing his brother was not justifiable or excusable, and, as the killing was intentional, the defendant committed murder in the first degree, or murder in the second degree, or voluntary manslaughter. Whether the evidence was sufficient to warrant a conviction of murder in the first degree, need not be discussed for a conviction for murder in the second degree on an indictment for murder is a bar to a subsequent prosecution for murder in the first degree (Com. v. Winters, 18 Phila. 667; Sadler Crim. Proc. 333; Com. v. Gabor 209 Pa. 201).

To reduce an intentional killing to voluntary manslaughter there must be both provocation and passion (Trickett's Crim. Law 856, and cases cited). The question whether certain facts are sufficient provocation to reduce a homicide from murder to manslaughter is one of law for the court (Lynch v. Com. 77 Pa. 221; Com. v. Paise, 220 Pa. 371; Pa. v. Bell Add 156).

As a general rule an assault without a battery is not regarded by the law as a sufficient provocation to arouse such a degree of passion as will reduce an intentional killing to manslaughter (25 A. and E. 182; Small v. Com., 91 Pa. 304). But if the assault was of such a nature as to evince an intent to inflict severe bodily injury it is a sufficient provocation (25 A. and E. 182; Penna. v. Bell Add 162; Trickett Crim. Law, 864). And it has been held that it is not always necessary that a blow shall have actually been struck and that it is sufficient if the deceased was evidently about to strike the defendant (21 Cyc. 747). The learned court below was wrong in holding that the provocation was not adequate.

Even though the provocation was adequate the killing is not reduced to voluntary manslaughter unless it excited passion (Trickett's Crim. Law 868). The burden is upon the prisoner, if the commonwealth has not proved it, to prove the existence of the passion.—Penna. v. Bell, Add. 156; Weston v. Com. 111 Pa. 251; Com. v. Drum, 58 Pa. 9.

In the present case there was no evidence tending to prove passion. The judgment of the learned court below must, therefore, be affirmed.

COMMONWEALTH V. SLOAN.

Larceny—Silence of Accused on Hearing Accusing Remark of Wife.

STATEMENT OF FACTS.

Sloan is tried for the theft of a hammer and other tools—six in number. They were found at his house three days after the theft. When the prosecutor visited the home, in searching for the stolen articles, Sloan's wife said that he had brought them the day before. Sloan, who was 20 feet away, but could have heard the statement, did not say anything. These facts were the only evidence of Sloan's guilt. He was convicted. Motion for new trial.

REDDING, for Commonwealth.

SAVIDGE, for defendant.

OPINION OF THE COURT.

LOKUTA, J.—Counsel for the motion contends that the statement made by defendant's wife in his presence as to the goods having been brought into the house a day before the finding of them by plaintiff, in possession of defendant, in his home, was as evidence against the defendant, evidence by a wife against her husband, not coming within the exceptions, and therefore not admissible as coming under the act of 1887, and this being true that upon this admission of evidence, there is ground for a new trial.

It is true, that the more recent the finding of stolen property in possession of a person after the theft of the property is, the stronger is the evidence of the person being the thief. This is sustained by authority given below. And then the evidence would show that the stolen goods were in possession of defendant two days after the theft instead of three days after, and thus it would be evidence by the wife against her husband. But we do not think that that alone is sufficient to sustain a motion for a new trial, although in connection with other evidence it may.

Another question arises, as we imagine, in this case; that is, "Whether the evidence given in the case is sufficient to sustain the charge made against the defendant." If not, then a new trial should be granted.

Taking of the articles by the accused may be inferred from circumstances; e. g., from his possession shortly after the theft, and his not giving a satisfactory account of manner in which, consistent with his innocence, he obtained it. If he gives an account jury must decide upon its credibility (Trickett's Crim. Law, Vol. I, p. 132; 118 Pa. 77). Possession must be shortly after the theft in order to justify a conviction of the theft from possession alone.

Com. v. Berney, 28 Super. 61 holds "That after 60 days an inference of larceny does not necessarily arise (that is, 60 days after theft was committed, the goods were found in defendant's possession, but here it was only three days after the theft). In order to convict a person of larceny because of possession of stolen property, it must be made to

appear that possession was recent. The law does not declare what this period is; much depends upon the character of property and circumstances of the case. This was surely covered in the present case.

If goods which had been recently stolen were found in his (defendant's) possession (personal and exclusive), and he knew that he had possession, that was evidence which it was proper for the jury to consider with all evidence in the case, in passing upon the guilt of defendant (10 Superior 657). Possession of part of stolen property is evidence of theft of the whole (25 Cyc. 132).

When a person is found in possession of stolen property, it is usually held that the burden of accounting for such possession rests upon him, as it is commonly put, that the possession of itself raises a presumption against the accused which will justify a conviction if he does not meet it by a reasonable explanation (25 Cyc. 133).

Possession of stolen goods is *prima facie* evidence that the possessor is the thief and throws upon him the necessity of accounting for his possession (9 Conn. 527; 102 Mass. 163).

In Com. v. ———, 138 Mass. 182, pigeons were stolen. "Two weeks" later they were found in possession of defendant, who said he bought them two weeks ago. Defendant asked the court to rule that there was no evidence to be submitted to jury; that possession of pigeons by defendant was not evidence that they were stolen, or stolen by him, and that possession by defendant was *not sufficiently recent* to justify the application of the rule as to recent possession of stolen property. Court refused to so rule, and instructed the jury as to effect of recent possession by defendant of property, if stolen. That possession not being accounted for was *prima facie* evidence of guilt. The Supreme Court said: That there was evidence that the pigeons were stolen by some person and possession by defendant was *sufficiently recent* to be evidence that he was the person who stole them unless it was satisfactorily explained.

People v. Weldon, 111 N. Y. 569, holds that there is no question but that recent possession of stolen property by a person raises a presumption of guilt which may be considered by the jury and in the absence of explanation by such person, authorizes it to infer a criminal connection with its eloignment. The presumption grows weaker as the time of possession recedes from the time of the original taking, but the fact itself is one for the consideration of the jury, under all the circumstances of the case (43 N. Y. 179; Knickerbocker v. People).

In almost all jurisdictions possession unexplained justifies a conviction. 25 Cyc. 136, 18 Pa. Super. 431, holds that possession of defendant must be personal and exclusive for the reason that such possession alone indicates that the goods have come to possessor by his own act or with his consent (151 N. Y. 493). Whether possession is recent enough is for the jury to decide (25 Cyc. 138). This is clearly found in the case before us; the possession was personal, being in his house, and the jury when deciding must have found it so.

Possession of fruits of crime recently after its commission is *prima facie* evidence of guilty possession, and if unexplained by direct evidence or by attending circumstances, or by the character and habits of life of

the possessor, or otherwise, it is taken as conclusive (Greenleaf on Evidence, p. 129, 16th edition).

From the above authorities we must conclude that there was sufficient evidence to put the case to the jury. The possession is sufficiently recent, the goods found in defendant's possession. What else could commonwealth prove? They did about all they could. It was upon the defendant to explain his possession of the goods. He could more easily prove where he got the goods, whether he bought them or they were brought to him by some one, than the commonwealth could prove that he did not buy them or that they were not brought into defendant's home by another and that defendant was innocent. Commonwealth has made out a *prima facie* case. It would be a great aid for criminals, in committing larceny, to allow them to steal the property, hold it in possession, say nothing, and if the commonwealth did not produce direct evidence of the theft then to let them free. It is better to force the thief to explain, how, when and where he got the goods that are in his possession, and recently stolen. We do not think the fact that defendant stood 20 feet from his wife when she made the statement concerning the bringing in of the goods is of much, if any, importance, and if so it would be against the defendant and not in his favor.

We must conclude that there was sufficient evidence to let the case go to the jury.

New trial refused.

OPINION OF THE SUPERIOR COURT.

The learned court below seems to have been of the opinion that the evidence concerning the statement of the wife, though inadmissible, was of such slight probative force that the defendant could not have been prejudiced thereby. In this opinion we cannot concur. If the fact that the goods were found at the house of the defendant a short time after the theft tends to show that he stole them, surely the fact that they were in his house *because he brought them there* is a matter of considerable significance and probative value; and if the evidence of this fact was improperly admitted, a new trial should have been granted.

The contention of the counsel for the defendant is that to admit evidence concerning the statement of the wife would be to allow a wife to testify against her husband. This view finds support in State v. Richardson, 141, Mo. 326, where it is said: "Where the wife is incompetent to testify against her husband, the testimony of a third person as to her declarations in the presence of her husband are not admissible against him" She was incompetent as a witness to testify to such a statement so made, and it necessarily follows that if she could not make it as a witness she could not make it to a third person and have him repeat it and thereby violate one of the fundamental rules applicable to the competency of witnesses; that is, that it is incompetent for a wife to testify against her husband.

The view of the Missouri court and of the learned counsel for the defense is due to the misapprehension of the nature of the evidence offered. The evidence of the statement of the wife is not offered as of

itself evidence of the truth of the facts stated, but simply to show that the conduct of the husband at the time of the making of the statement was such as to indicate his guilt. It has therefore been held that evidence of such statements is admissible. "It makes no difference that the statements which call for a reply were made by a party who is incompetent to testify" (2 Enc. L. & P. 41; Abbott Crim. Trial Brief, p. 214). This rule was applied where the statement was made by the wife in the following cases: P. v. Bartlett, 7 Car. & P., 832; R. v. Smith, 5 C. & P. 332; Garett v. S., 76 Ala. 18; S. v. Middleham, 62 Iowa 150; Com. v. Lunai, 148 Mass. 70. In S. v. Record, 151 N. C. 695, it is held that upon the trial of one for larceny declarations of his wife made in his presence to the effect that the stolen property found in the house belonged to the husband are admissible.

In this case the statement of the wife was made within 20 feet of the husband and he "could have heard it." Whether he did hear it was a question for the jury (2 Enc. L. & P. 37).

The learned court below correctly held that the evidence presented was sufficient to warrant a conviction.

BOOK REVIEWS.

A Digest of the Laws of Pennsylvania, from 1700 to 1907, by GEORGE WHARTON PEPPER and WILLIAM DRAPER LEWIS. Second edition. In four volumes. T. & J. W. Johnson Co., Philadelphia.

For several years the profession has been anxiously awaiting the appearance of this edition of Pepper and Lewis' Digest. The first edition was a great improvement upon the Purdon then in use. Its annotations were much more nearly complete. The various mechanical features of the book commended it especially. The type was large and clear, a property of which its rival could not be accused. The broad page was divided into two columns, a feature of which only experience enables us to realize the value. The annotations, instead of being thrown to the foot of the page, followed the annotated paragraph, so that the eye readily caught it, not having to drop to the bottom of the page, nor to pick it out from a large mass of notes in very small type. These and other more important qualities of the work made its obsolescence a matter of regret, and a new edition was eagerly longed for. It has at length arrived, and we most heartily congratulate the lawyers of the state upon its appearance.

The notes, always an important feature of a statute digest, are not intended to express the common law of a given subject, but simply the decisions upon the statute law, thus avoiding the error of excessive and irrelevant annotation. The lawyer does not

expect to find, in his statutory code, anything else than statutes and the cases in which these statutes have undergone interpretation. At the end of the notes, if other cases than those mentioned therein exist, the appropriate place in Pepper & Lewis' Digest of Decisions is referred to. Almost all lawyers have ready access to this Digest, and when the column therein is named where the cases may be found, useless duplication is avoided by citing the exact place.

Titles have been made as numerous as possible, and since the articles under them are arranged alphabetically, it is easy to find quickly what the searcher is pursuing. Careful attention has been given to cross-references, so that the possible headings under which the matter which is looked for may be found; if not found in the article being examined may be discovered elsewhere.

A very valuable feature of the work is that it gives, at the head of each article, a list of section headings, and a complete table of all the general acts bearing upon the subject. Repealed acts are indicated, as well as those which have become obsolete, because repealed, or pronounced unconstitutional.

Possibly the most important new feature of the work is the chronological table of acts, in the fourth volume. Each act is treated section by section and specific information given relating to each section. "By means of this list," say the editors, "any one using the Digest may ascertain at once whether or not any given section of a general act is in force, and if not in force, or amended, by what act it was repealed, superseded or amended." The amending act is also found in the list with information as to whether it is in force or not.

This table of acts indicates where, in the digest, each particular section of it may be found. The experience of the writer has been that the absence of such reference causes, in the search for a given section of an act, an immense loss of time. A table of cases is found in the fourth volume, with reference to the paragraph and title where each is cited.

Special attention has been paid to the preparation of the index. The books are handsomely printed and very pleasingly bound in law buckram.

The mechanical features of the first edition, to which reference is made at the beginning of this notice, are repeated in the new edition: clear, large type; double columns; notes immediately following the sections; bold, black-faced type at the beginning of every section, indicating its topic. The volumes are handsome examples of the typographer's art, and the binding is chaste, beautiful and durable. In a word, the work is admirable and to the legal investigator indispensable. Editors and publishers deserve alike the gratitude of the profession for it.

Ethical Obligations of the Lawyer, by GLEASON L. ARCHER, LL. B., Dean of the Suffolk School of Law. Little, Brown & Co., Boston, 1910.

We have found this a very readable book of over 360 pages. It undertakes to state the obligations of the lawyer to society, to his client, to the courts, to other lawyers, and this task it does not only very entertainingly, but very seriously. The small, not less than the large duties of the lawyer, are mentioned. He "should maintain a neat and well-groomed appearance." He should impress the visitants of his office with his erudition, by "arranging what books he has in the most imposing array possible," and as "law books are all alike to the ordinary client," the lawyer need not be particular as to what books he puts on his shelves, so that they seem to the unlearned to be law books. A suggestion much needed in small towns is that the "law office should not be a lounging place for the attorney's idle friends and acquaintances." The book is not too idealistic. Although, theoretically, "all clients should stand on exactly the same basis," yet in this "practical world" the lawyer will naturally devote more attention and vigilance to the legitimate claims of a client who can pay handsomely than he will to the service of an impecunious client." The author states elsewhere, that "a larger retainer would be expected from a wealthy client than from a poor man," but on what principle is not made clear. The book wisely advises against a lawyer's undertaking to explain too fully to his client the exact legal steps which he is going to take. Nothing can make the lawyer more ridiculous, though it flatters the conceit of the client. Concerning the matter of contingent fees, of making a defense of one believed to be guilty, and of other much mooted problems, the author advises judiciously. The book contains an appendix, the American Bar Association's Canons of Ethics, and Hoffman's Fifty Resolutions in regard to Professional Deportment. We cordially recommend this book to the practicing attorney and to the student of law.